abandon [the Ries'] line of credit" by "contacting the [Ries] and sending letters claiming that [the Ries] should repay [their] existing line of credit in full to Bank of America." In the eighth cause of action for breach of fiduciary duty against all defendants, the Ries alleged that defendants breached duties owed under the deed of trust.

B. Demurrer to First Amended Complaint.

Respondents demurred, requesting that the court take judicial notice of a verified complaint in a prior action initiated by Rie, which contained the following statement: "It was not until January 7, 1999 that defendant Tursugian served the required Notice."

The court sustained without leave to amend with respect to the causes of action for wrongful foreclosure, breach of contract, and conspiracy. Concerning the wrongful foreclosure claim, the court accepted as true that the section 2966 notice was served on January 7, 1999, as stated in the Rie v. 6 Angels action, noting that nowhere in the verified complaint in that action was there an allegation that the notice was not received by the Ries. In addition, the court stated that the Ries' allegations that they did not receive the notice were "irrelevant" because: "[The Ries] were nevertheless required to make the balloon payment by 4/15/99. Civil Code § 2966(b) provides any failure to provide notice of a due balloon payment as required by that section does not extinguish a trustor's obligation to make payments on a note, 'except that the due date for any balloon payment shall be the date specified in the note, or 90 days from the date the delivery or mailing of the notice, or the date specified in the notice, whichever date is later.' [The Tursugians] served notice of the due balloon payment on 1/7/99. [The Ries] were thus required to make the balloon payment on 4/15/99, since it was a later date than the date 90 days after the notice was mailed. Having failed to make that payment, [the Ries'] claim of wrongful foreclosure is without merit."

The court concluded that the breach of contract claim was "defective" because the written document attached to the

complaint was contradictory to other allegations that indicated that some compromise other than continued payment of $ 4,000 per month or immediate payment of the balance had been reached. In addition, the author of the document was not identified in the FAC, and it was not signed.

As to the third cause of action for misrepresentation, the court rejected a statute of limitations defense. The court tentatively granted the demurrer without leave to amend as to the fifth cause of action for fraud on the ground that it was duplicative of the third cause of action for misrepresentation. In its final order, however, the Ries were given permission to amend the third and fifth causes of action to clarify that the former was for intentional misrepresentation and the latter for negligent misrepresentation.

The court stated concerning the fourth (unfair collection practices) cause of action that "the allegations that [the Ries] never received notice of balloon payment and the allegations of an agreement made on or about December 1998 or January 1999 are contradicted or unsupported and therefore cannot form the basis of a claim for unfair debt collection practices." The demurrer was sustained with leave to amend. Demurrer was sustained to the sixth cause of action for conspiracy with leave to amend because it was based on the theory of wrongful foreclosure to which demurrer had been sustained. No reference was made in the court's order to the seventh cause of action for intentional interference.

The court's order categorized the demurrer to the eighth cause of action for breach of fiduciary duty as "overruled." However, the order clarified: "The Tursugians were the beneficiaries under the trust deed. Rosen and Rosen and Loeb were their attorneys and neither trustees nor beneficiaries under the trust deed. [The Ries] fail to indicate how [respondents] owed them a fiduciary duty. However, SBS Trust Deed Network is alleged to have failed to insure proper compliance with the state foreclosure laws."

C. Second Amended Complaint

The Ries filed a second amended complaint (SAC) in compliance with the trial court's ruling. In the first cause of action

for negligent misrepresentation, the SAC alleged that respondents made misrepresentations concerning the terms under which they would accept payment on the note, the time frames under which they would accept payments, and the circumstances under which the Ries would lose or forego their rights. In addition, respondents "falsified the dates that certain critical events took place" and "failed to notify [the Ries] of certain foreclosure proceedings."

In the second cause of action for intentional misrepresentation, the SAC alleged that respondents "fraudulently and intentionally deceived [the Ries] into believing that the parties had reached an arrangement with respect to handling the remaining balance" on the note and "informed [the Ries] that [respondents] would accept certain terms of payment on the promissory note," and then "refused to accept payments in order to fraudulently force the property into foreclosure." The SAC also accused respondents of "fabricating documents and backdating them to reflect earlier dates of notices that were never sent on the date proffered."

The third cause of action for interference with prospective economic advantage and the fourth cause of action for breach of fiduciary duty in the SAC were essentially the same as in the FAC, and again named all defendants.

D. Demurrer to Second Amended Complaint

Respondents demurred to the entire SAC. This time the court sustained the demurrer without leave to amend as to the first, second, and fourth causes of action for misrepresentation and breach of fiduciary duty. It sustained the demurrer with leave to amend as to the third cause of action for interference with economic relations. The court stated that it sustained the demurrer with respect to the negligent misrepresentation claim because the allegations were vague, the representations alleged appeared to be intentionally rather than negligently made, and the damages alleged were caused by the foreclosure, "a transaction which the court previously found to be proper."

With respect to intentional misrepresentation, the court stated: "In ruling on Defendants' prior demurer, the court took judicial notice of [the Ries'] verified complaint that was filed in [Rie v. 6 Angels,] case BC223268, and the allegations in P20 of that complaint that [the] Tursugians had served notice of the balloon payment on 1/7/99. The court found that this allegation amounted to an admission by [the Ries] that they had received the requisite notice as of 1/7/99. The court found that the Ries are bound by the contradictory verified complaint in case BC223368 in which notice of the balloon payment on 1/7/99 is binding upon them for the purposes of the statute of limitations analysis as to this cause of action."

The court held that the intentional interference cause of action was Demurrer was sustained with leave to amend. Demurrer was sustained in part to the breach of fiduciary cause of action, eliminating respondents only, leaving SBS as a defendant.

E. Third Amended Complaint

The Ries filed the third amended complaint (TAC) without the assistance of counsel. In it, they restated their claims for wrongful foreclosure, negligent misrepresentation, intentional misrepresentation, unfair collection practices, and conspiracy. In the cause of action for intentional interference, new allegations were added concerning respondents' motives, but no new allegations concerning what had been done to interfere. The breach of fiduciary duty cause of action was restated essentially as in the prior pleadings.

Respondents moved in limine for an order excluding all evidence at trial relating to the first, second, third, fifth, and seventh causes of action in the TAC, due to the sustaining of the demurrers without leave as to those causes of action. The motion was granted without due process. The Ries would not try the case without these claims, and the matter was dismissed.

VI. THE SCENARIO AND DISASTER ON AUGUST 6, 2003

A. Introduction

There was supposed to be the trial/hearing at the trial court on August 6 of 2003 in this Rosen Case. Petitioner is using two terms, because it was ambiguous actually. The formal court record shows it was a trial rather than a hearing. Not only on that day of August 6, 2003 but also until the recent time, Petitioner had not been aware of the true legal implication of this ambiguity. Nevertheless, now at the time of preparing this petition brief in August of 2005, he realizes that there was a trial only but no hearing for motion in limine in due process. Hence, now, he calls it "August Disaster".

Formally and actually, there was no motion in limine hearing. The unlawful perfunctory hearing (not real hearing in due process) just happened abruptly at the trial court. It implies that the trial court attempted to proceed the trial without handling motion in limine and its opposition in due process.

Since Petitioner insisted on the ruling on motion in limine and its opposition on that trial day, the trial court heard it reluctantly and perfunctorily without reading the opposition fully and with a lot of cuts/interruptions of Petitioner's argument and under the intimidating atmosphere.

Let us follow the proceeding according to Reporter's Transcript (hereinafter, "RT").

B. Major Scenes

According to RT P1 L23, 26-28:

> Mr. Rie: She gave full authority to me.
>
> ...
>
> The Court: Okay. She was ordered to appear. Was there proper notice as to the plaintiff Cheon Rie to be here in person?

Hereby the full authority was for the motion in limine rather than for the trial. And the proper notice for the order to appear was unclear. Rosen tried to find it but could not show it to the court, as seen in RT. Now, Petitioner believes the proper notice to Cheon Rie had not been made.

According to RT P3 L14-16:

Mr. Rie: ... I was supposed to receive the answer November of last year, but this is old. After receiving the answer through discovery process, including interrogatories and depositions and finishing that discovery and we would be ready for trial.

This part of oral expression of Petitioner was not fully understood by Judge Hiroshige but pretty well understood by Rosen. The related comments will continue soon.

According to RT P6 L13-28:

Mr. Rie: I have not decided that yet because I haven't heard your ruling yet.

The Court: Okay. Well, he wants to be heard as to the motion in limine. Do you – Mr. Rosen, do you want to remind me as to when the third amended complaint was filed?

Mr. Rosen: July 14th, your honor.

The court: Of this year?

Mr. Rosen: Yes, just last month.

The Court: So his argument that he should have had an answer to the third amended complaint a year ago –

Mr. Rosen: Right.

The Court: – Would be nonsensical.

Mr. Rosen: Of course. Yes, your honor. He's referring to the fact that he served the complaint last October.

While Petitioner read this part of RT recently to prepare this brief, as well as at that time of the hearing, he felt this perfunctory unlawful motion in limine hearing started reluctantly and cynically. In addition, some weird communication was exchanged between the court and Rosen. The court implies it is nonsensical because of Petitioner's argument that he should have had an answer to the third amended complaint a year ago. This is one of the evidences that the trial court was doing this hearing while misunderstanding Petitioner's argument and opposition to motion in limine. Of course it was logically nonsensical if an answer should be made a year ago to TAC filed a month ago. By the way, Rosen agreed to that it was nonsensical, but he understood what Petitioner meant unlikely the court by stating "the complaint last October". Then, Petitioner's argument (RT P1 L23, 26-28) was not nonsensical.

According to a pretty long quote from RT P11 L10 – RT P12 L17:

Mr. Rie: ... I think September 18th 2000. So in the rule of Res Judicata, the cause of action already approved by Judge Dau.

The Court: So you're admitting this is another lawsuit? So you're admitting that you had the same causes of action?

Mr. Rie: Three causes --

The Court: Would you, sir, when I'm talking –

Mr. Rie: Okay. Okay.

The Court: Do not interrupt me again.

Mr. Rie: Okay. Okay. Okay.

The Court: You're going to be in contempt of court.

Mr. Rie: Okay. Okay.

The Court: All right. As I was saying to you –

Mr. Rie: Yeah.

The Court: -- What you're doing is you're saying you had another case. Judge Dau, Ralph Dau, was the judge that presided over that case. And you're saying that the same cause of action was overruled in a demurrer, and you're admitting that this lawsuit is the same lawsuit that you had before, right?

Mr. Rie: Oh, I'm not sure.

The Court: Otherwise, your argument makes no sense, sir.

Mr. Rie: That is hard to answer, but I want to clarify one thing. The cause of action is not all causes of action, only four causes of action, okay? Wrongful foreclosure –

The Court: You can't have the same causes of action in another lawsuit, and then bring it – because you lose that lawsuit, you're not satisfied with that, and you can't sue them again.

Mr. Rie: Names of the causes of actions are the same. Anyway, one is wrongful foreclosure and intentional –

The Court: Let's hurry it up, sir. You're not making many good points here. But hurry up.

Mr. Rie: Okay. The second argument – oh, no, ...

Petitioner was orally arguing for TAC against motion in limine mainly according to the 5th argument in the opposition (CT000118 L4 – CT000119 L3). Numerous cuts/interruptions of Petitioner's representation by the court began to happen from about this time point. Only during the above quote, the cuts took place at P11 L12-13, L16-17, P12 L8-9, L14-15 of RT, and the last cut was together with "hurry it up". And there were also leading of layman by judge a few times to make a legal

conclusion. The legal conclusion is "your argument makes no sense" and "You're not making many good points here." The leading is to lead the layman to admit Rosen Case is different kind of lawsuit from Six Angels Case.

In addition, there were irrelevant and intimidating and abusive remarks by the court. One of them is "You're going to be in contempt of court." The court said after implying interruption of Petitioner. Moreover, "Three causes ..." was not really to interrupt but is to try to supplement or reply to the question of the court.

And the part of "You can't have the same causes of action in another lawsuit, and then bring it – because you lose that lawsuit, you're not satisfied with that, and you can't sue them again," is not only intimidating but also irrelevant. We were supposed to discuss pro and con about that since the demurrer in Six Angels Case was overruled, the demurrer in Rosen Case should also be overruled, but not pro and con about that since Six Angels Case was dismissed, Rosen Case should also be dismissed.

Now, Petitioner believes that Judge Hiroshige did not read the opposition sufficiently and did not read at least the part of res judicata argument at all, and was very embarrassed at this argument.

According to RT P13 L27 – RT P14 L15:

Mr. Rie: But... but...

The Court: I'm going to tell you sir, it is improper to keep bringing lawsuits based on prior lawsuits just because you lose and you're not happy with what happened the previous time. You know, there's such a thing as malicious prosecution of another party. And also, you're going to become a vexatious litigant under the statute if you bring another lawsuit. After a certain number where you lose all your lawsuits, you're going to have to put a bond to bring your next lawsuit. So –

Mr. Rie: May I say something?

The Court: No.

Mr. Rie: Oh, okay. Okay.

The Court: I just want to know if you're ready to proceed with the trial. That's what we're going to do next. Ready?

In this quote, there were 2 cuts, between RT P13 L27-29 and RT P14 L10-11, which were related to the last cut in the next quote, and the second one was with explicit cut with "No".

In addition, there were redundant and irrelevant and inaccurate and intimidating and humiliating and abusive remarks on Petitioner, a layman, while using "malicious prosecution" and "vexatious litigant". Apparently, Judge Hiroshige had no accurate knowledge about the dismissal of Six Angels Case, though Rosen had it, that is why Rosen explicitly implored the court to add "with prejudice". Petitioner will not elaborate about "redundant" and "irrelevant" any more here, and "abusive" may be argued to be a legal conclusion, but Petitioner truly felt "intimidated" and "humiliated" by these remarks and the atmosphere.

According to RT P17 L12-15:

> Mr. Rie: Because this delayment was caused by Mr. Rosen's deceit and – His deceit...
>
> The Court: Sir, that's the end of the proceeding. Do not discuss it further.

The last cut occurred between L13-14 as the above. Petitioner was stating a critical point in this case, and the trial court cut and ignored it. This cut per se may be fine. But together with the previous 2 cuts, it was not fine. This argument was a[t]tempted but had also been cut 2 times at RT P13 L27-29 and RT P14 L10-11. Each of three cuts may seem to be OK per se, but they all together are not OK through part-whole logic overcoming part-whole fallacy. This is an example in which the chance of sufficient and effective oral argument was deprived by the trial court.

C. Analyses on August Disaster

The trial court did not read opposition to motion in limine sufficiently and made ruling. That is "not to read" and "to make ruling". Just not to read per se may be all right, and to make ruling per se may be all right. To drink per se is all right, and to drive per se is all right. But to drink and to drive are not all right.

It is not all right that the trial court did not read opposition to motion in limine sufficiently and made ruling immediately.

The proceeding was about 20 minutes, and about only half of this time was used for motion in limine hearing, whereas the other half was used to discuss the trial and blame Petitioner for being not ready for trial.

There were so many cuts/ interruptions of Petitioner's oral argument by the trial court. There were at least 7 cuts.

The trial court had no plan for motion in limine hearing. It just had planned to proceed the trial on August 6 2003 while totally ignoring TAC. Then, since Petitioner insisted on the hearing, the trial court allowed it reluctantly and perfunctorily.

It was pre-determined to ignore or refuse TAC and proceed the trial. This is a violation of civil right for due process of one of the people of the United States.

Without sufficient understanding of TAC and opposition to motion in limine, the trial court presided on the motion in limine hearing as a non-planned hearing reluctantly and perfunctorily.

Petitioner could not sufficiently and effectively argue orally because he felt intimidated and interrupted in the courtroom.

Petitioner felt like 2 vs. 1 game in that proceeding, rather than 1 vs. 1 game with 1 referee. Moreover, he felt as if it were a game of a layman vs. a lawyer and a judge.

D. Appellate Court Failed to Correct the Violation of Due Process in August Disaster by the Trial Court

The opposition to motion in limine has 68 pages including the exhibits, which also contains Rie's Document 1 (CT0000113-118 of Rosen Case). Judge Hiroshige's conduct violated not only decorums but also the 14th amendment civil rights to due process, as described in the above. Later, through Opinion, Appellate Judges failed to correct the negligence and dereliction of Judge Hiroshige and the infringement of civil rights of Plaintiff, and continue or even reinforce those infringements.

Plaintiff's civil rights for due process and so on is still in infringement. Rather, Appellate Judges infringed the civil rights of Plaintiff even more significantly and more broadly than Judge

Hiroshige. The non-act errors and/or negligent errors committed by Judges are Error 2 in Opinion of Galperin Case and Errors 1, 2, 3, 4, 11, 12, 14, 15, 16, 17 in Opinion of Rosen Case.

As explained in the opening brief and in the above, it is obvious that the trial judge violated the 14th amendment of the United States Constitution for the civil rights for due process and so on. It is a very serious violation. Then, the Appellate Judges were supposed to recommend the formal hearing for in limine motion and the subsequent jury trial, where the facts and credibility could be decided by jurors. To have the jury trial is another civil right. This another civil right has been also infringed by the Appellate Judges. Instead, they described this serious infringement of civil right as, "The Ries' brief also discusses the hearing on the motion in limine at length. Rie attempted to reargue the viability of causes of action to which demurrers had previously been sustained without leave to amend. He complains that the trial court did not give him a fair hearing. The only issue at the hearing was whether the Ries were prepared to go to trial in the absence of the claims to which demurrers had been sustained. They obviously were not willing to try the case under those conditions, and the entry of dismissal was appropriate. (P12 of Opinion)" Now, Plaintiffs are informed and believe and thereon allege that some sympathy between judges caused the appellate judges to describe the serious civil right infringement just a trivial issue of "He complains that the trial court did not give him a fair hearing." The real issue is different from the allegation by the allegedly sympathized Appellate Judges. The real issue is that the formal hearing should be made again in the trial court because trial judge obviously infringed the civil rights for due process of one of the people of the United States.

VII. PROCEDURAL HISTORY

This case was initially brought before Honorable Ernest Hiroshige in the Los Angeles County Superior Court. That court entered judgment on August 6, 2003. Petitioner timely filed a

motion to appeal with the Second District Court of Appeals. That case was briefed and later argued and submitted on October 22, 2004.

On March 30, 2005, the Supreme Court of California denied the petition for review.

VIII. SUMMARY OF THE ARGUMENT

The desirability of exercising exceptional judicial management in complex proceedings has been recognized in several federal and state cases and statutes.[5] Under 28 U.S.C.S. § 1915(d), the Court may request an attorney to represent a person in a civil proceeding when issues presented by the case are so complex that denial of counsel would be likely to result fundamental unfairness.[6] Further, in criminal cases, before a criminal defendant may represent himself at trial, the defendant must knowingly and intelligently waive his right to trial.[7] The danger of self-representation in complex civil matters is also recognized at the state level implicitly in California Rules of Court Rule (C.R.C.) 1800, which encourages judges faced with a complex case to consider issuing case management order or similar remedy to supervise complex litigation.

The above rules recognize that self-representation is almost always unwise[8], particularly in criminal and complex civil cases where the opposing counsel is experienced, professional counsel who has the advantage of skill, training and experience. In addition, such cases involve complex facts and questions of law,

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[5] See e.g., Carnley v. Carnley, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70; Barnhill v. Doiron, 958 F.2d 200, 202 (7th Circuit 1992); Hernandez v. The Superior Court of the State of California, 112 Cal. App. 285, 4 Cal. Rptr. 3d 883 (2003); Volkswagen of America, Inc., et. all. V. The Superior Court of the City and County of San Francisco, 94 Cal. App. 4h 695; 114 Cal. Rptr. 541 (2001).

[6] United States ex rel Wissenfeld v. Wilkins, 2 Cir. 1960, 281 F 2d 707

[7] Faretta v. California, 422 U.S. 806 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

[8] IV Witkin Cal. Crim. Law § 256 (a) (2).

which are unfamiliar to self-represented parties. The result is that the self-represented parties may easily conduct his or her case in a manner to his or her own detriment.

The Petitioner is requesting that the trial courts be required to issue a warning to the litigant regarding the risks and disadvantages of self-representation in complex civil cases similar to the forewarning given to a criminal defendant and civil litigant in complex federal civil cases. Without such a warning, the proper standard of review under California Civil Procedure § 473 is the reasonable lay-person. Petitioner raised this issue on appeal, contending that the proper standard of review under CCP § 473 was a reasonable lay person. Petitioner was not given a warning regarding the dangers of self-representation in a complex case and thus, was unaware that the case was, in fact, complex. Further, Petitioner is self-represented, and lacks any legal training. This case is complex in that it involves parties from several counties and multiple legal claims and requires exceptional judicial management.

Petitioner is also requesting that the Court interpret California Civil Code § 2966 to require actual receipt by a trustor of notice a balloon payment. Petitioner desires that the Court does not apply the alleged judicial admission made in a separate but related case to the Rie v. Rosen case because to a layman this was not, in fact, a judicial admission. Petitioner also desires that the Court remand this case to the trial court for the real and fair hearing for motion in limine while giving sufficient chance to read the his opposition including Rie's Document. The questions presented by this petition are important because it impacts the fundamental right of every citizen to a fair trail and Due Process.

IX. STATUTORY AND CASE LAW BACKGROUND

Before a criminal defendant may represent himself at trial, he must knowingly and intelligently waive his right to counsel.[9] In order to competently and intelligently choose self-representation,

[9] Faretta, 422 U.S. 806, (1975).

"defendant should be made aware of the dangers and disadvantages of self representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."[10] The test of a valid waiver of counsel is not whether specific warnings or advisements were given, but whether the record, as a whole, demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case.[11] Many district courts require judges to ask the defendant a series of questions drawn from the model inquiry set for the in the Bench Book for United States District Judges. After the questioning, the district court should make an express finding on the record that the accused has knowingly and voluntarily waived his right to counsel.[12] Thus, the burden is placed on the court to apprise the defendant of the dangers of self-representation before a waiver of the right to counsel is effective.

While there is no right to counsel in civil matters, several statutes allow appointment of counsel in a civil matter. Title 28 U.S.C. § 1915(d) empowers the Court to appoint counsel in civil actions brought in forma pauperis. Appointment of counsel is discretionary and requires an evaluation of both the likelihood of success on the merits and the ability of the plaintiff the articulate his claims pro se in light of the complexity of the legal issues involved. Counsel can also be appointed in other civil cases, such as cases brought pursuant to 28 U.S.C.S. § 2255. Again, the complexity of the case is one of the determining factors in whether counsel should be appointed. In such complex cases, the court has found that the denial of counsel would likely result in fundamental unfairness.[13]

Further, a civil case may be designated as "complex" and thus require judicial management. California Rules of Court §1800, defines a "complex case" as "an action that requires exceptional

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[10] Id., at 835.
[11] People v. Bloom 48 C.3d 1194, 1225, 259, C.R. 669, 774 P.2d 698 (1989).
[12] See e.g., United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987).
[13] Barnhill, 958 F.2d 200, 202 (7th Circuit 1992).

judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." In determining whether the case is complex, the Court considers, among other things, whether the action is likely to involve:

1. Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
2. Management of a large number of witnesses or a substantial amount of documentary evidence;
3. Management of a large number of separately represented parties;
4. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
5. Substantial post-judgment supervision.

The California Government Code section 68607 reflects the same concern for the manner in which complex case should be handled. It provides that "in accordance with this article and consistent with statute, judges shall have the responsibility to... actively manage the processing of litigation." However, in California, unlike criminal cases and federal complex civil cases, there is no statute or case law to suggest to court is required to apprise the plaintiff of the dangers of self representation despite the complexity of the case.

California Civil Code § 2966 provides that in a balloon payment note when the term for repayment is for a period in excess of one year, the holder of the note shall, not less than 90 nor more than 150 days before the balloon payment is due, deliver or mail by first-class mail, with a certificate of mailing obtained from the United States Postal Service, to the trustor, or his or her successor in interest, at the last known address of such person a written notice. In drafting such a law, the legislature hoped to protect borrowers by requiring proper notice be given before foreclosure.

X. ARGUMENT

A. STATUTE AND CASE LAW SUPPORT THE PROPOSITION THAT THE COURT WARN LITIGANTS IN COMPLEX CIVIL TRIALS ABOUT THE DANGERS OF SELF-REPRESENTATION.

In criminal trials, a defendant is constitutionally entitled to counsel. If a defendant

chooses to represent himself or herself, the Court must adequately warn of the dangers and disadvantages of self-representation. The Court must affirmatively show that the record, as a whole, demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case. This requirement reflects the concern that self-representation is most often not the desirable option and can often lead the defendant to act in ways detrimental to his or her defense. In addition, the state is always represented by a skilled attorney who has the knowledge and expertise that the defendant likely lacks. This requirement also reflects concern for the risk and losses that the defendant faces, which is often imprisonment and/or monetary fines.

As stated in Part VII, statute and case law gives the court discretion to appoint counsel in complex federal civil cases where a denial of counsel would, in effect, reduce the proceeding to an ex parte proceeding.[14] Petitioner is asking that the less burdensome of the two rights given to criminal defendants be afforded to litigants in complex civil matters: that a warning be given before a litigant appears in pro per in a complex civil matter.

The designation of certain civil case as complex, and thus requiring judicial management, further illustrates the need for particular caution in such matters. In allowing such judicial management, the Court recognizes the dangers involved in complex litigation even for experienced attorneys. In pro per litigants should at the very least be aware of how the Courts view

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[14] Dillon v United States, 307 F.2d 445, 453 (1962).

such litigation and why self-representation carries inherent dangers. Here, Petitioner was unaware that this case is considered complex and required particular expertise and training. As a result, Petitioner made fatal mistakes.

B. POLICY SUPPORTS THE NECESSITY OF SUCH A WARNING.

It is well recognized that all courts have inherent supervisory and administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. Federal courts have long recognized that active and effective judicial management of litigation is critical. One federal court has explained that managerial power is not merely desirable, it is necessary.[15] Judges are permitted, therefore, to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.[16] As improvements in technology lead to increasingly complex litigation, the need for the supervision of the court has increased. The courts are also concerned with overbroad litigation. The system cannot tolerate lawsuits by prospective plaintiffs who sue multiple defendants on speculation.[17]

A warning regarding the dangers of self representation will mitigate costs, expedite litigation, and promote effective decision-making by the court, the parties, and counsel. Such a warning allows litigants to consider whether the complexity of the case requires the guidance of counsel. In turn, such cases will necessitate less judicial management because both parties are represented by counsel. This warning, unlike the appointment of counsel, cost only a few moments of time but saves the court's time and the litigants from potentially making costly mistakes. Litigants in complex civil cases often risk facing heavy fines and

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[15] First State Insurance v. The Superior Court of Los Angeles County, 79 Cal. App. 4th 342, 94 Cal. Rptr. 2d., 104 (2000).

[16] Id.

[17] Bockrath v. Aldrich Chem. Co., 21 Cal. 4th 71, 81, 86 Cal. Rptr. 2d 846, 980 P.2d 398 (1999).

other financial burdens as result of the litigation. Thus, the reasoning behind the warnings given to criminal defendant applies to litigant in complex civil matters as well.

C. WITHOUT SUCH A WARNING, THE RIGHT TO A FAIR TRIAL AND EQUAL PROTECTION UNDER THE CONSTITUTION IS DENIED.

The court has recognized that in complex civil cases the court might need to appoint counsel.[18] In such cases, the court has further recognized that the denial of counsel could result in fundamental unfairness.[19] Although there is no right to counsel in civil cases, factual issues can be so complex in civil cases that the denial of counsel would reduce the hearings to an ex parte proceeding.[20] Petitioner does not contend that the court should have appointed a counsel in his case despite its complexity, but rather holds that the court should have apprised Petitioner of the disadvantages of self-representation in this complex matter at the outset of the trial. Such a warning would have put Petitioner on notice of the risks of proceeding in pro per. As a result, Petitioner made grave errors that impacted the outcome of his suit. Due to the complex nature of the suit both factually and procedurally, the lack of such a warning affected the Petitioner's right to a fair trial.

Further, the lack of such a warning requirement violates the Equal Protection Clause of the United States Constitution. Because prison inmates are provided a warning regarding the risks of self-representation and possibly appointed counsel in complex civil matter, it follows that all litigants are entitled to this warning, as the risks are just as great in these complex civil matters. Here, the Petitioner was denied his right to a fair trial and equal protection because he was never advised of the risks of self-representation, he lacked to proper training to determine the

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[18] See Boodie v. Conneticuit 401 U.S. 371, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971). M.L.B. v. S.L.J., 519 U.S. 102; 117 S. Ct. 555; 136 L. Ed. 2d 473.

[19] See DesRosers, 949 F.2d 15, 24 (1st Cir, 1991); Barnill, 958 F.2d 200, 2002 (7th Cir 1992).

[20] Dillon, 307 F.2d 445 (1962).

complex nature of the case on his own, and consequently conducted the case to his detriment.

D. BECAUSE THE COURT FAILED TO GIVE SUCH A WARNING, THE PROPER STANDARD OF REVIEW UNDER CPP § 473 WAS A REASONABLE LAY-PERSON.

Once a warning regarding the risks of self representation is given, a litigant in a complex civil case is put on notice that he or she proceeds at his or her own risk. However, without such a warning the litigant, due to inexperience, is often unaware of the dangers of self-representation in complex cases. The requirement of such a warning is simply an extension of the need for judicial management in complex case already practiced by the court. In cases where such a warning is not given, as is the case here, the proper standard of review under California Code of Civil Procedure § 473 is the reasonable lay-person.

E. BECAUSE THE COURT FAILED TO GIVE SUCH A WARNING PETITIONER ACTED IN DETRIMENT TO HIS CASE, AND SUCH ERRORS SHOULD BE EXCUSED.

In his appeal, Petitioner refers to the fact that the Petitioner is "a layman without such legal experiences and whose major was economics but not law and whose native language was not English."[21] Petitioner is admitting to the fact he lacks the requisite legal knowledge. As a result, he made several fatal mistakes which should be excused by the Court. Specifically, Petitioner was unable to prepare for trial of August 6, 2003[22] in time because he was not given notice of the complex nature of the case. The opposing party was a firm with legal and expertise, while the Petitioner is a layperson without the requisite legal knowledge.

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[21] Rie v. Rosen, Appellate Brief p. 7

[22] As of August 6, 2003, some of the causes of action (such as unfair collection practices, interference with economic relations, breach of fiduciary duty) were still alive as viable claims regardless of the issue of the alleged judicial admission.

F. CALIFORNIA CIVIL CODE § 2966 SHOULD BE INTERPRETED TO REQUIRE ACTUAL RECEIPT BY A TRUSTOR OF NOTICE OF BALLOON PAYMENT AND THE CURRENT INTERPRETATION VIOLATES 14th AMENDMENT RIGHTS TO DUE PROCESS.

California Civil Code § 2966 requires holders of notes with balloon payments to provide written notice by certified mail of when the payment is due within a specific time frame. The Appellate Court found that this section should not be interpreted to require actual receipt of notice. However, there was no case law to support such a finding. Instead, the court relied on case law applicable only to Civil Code §§ 2924-2924(h).

By not requiring actual receipt, the court ignores the legislative intent behind § 2966. By requiring the additional step of certified mail, the statute serves to protect borrowers. Further, to not require proof of receipt renders the additional requirement of notice to be sent by certified mail useless. As Petitioner states in his appeal, "Not requiring actual receipt of notice can cause ... dangerous situations in the real world by dishonest and fraudulent people. For example, the whole process of foreclosure caused by balloon payment issue can be consummated even without a single certificate. It can be and will be abused with fraud and/or with conspiracy by unconscionable people. Further, this fraud or conspiracy will be encouraged for those trustees who have smaller amount of loan or smaller ratio of debt/property." Simply requiring that proof of receipt be necessary to validate the service under § 2966, supports the Legislative intent to protect borrowers by requiring that the notice be made by certified mail with a receipt rather than by regular mail. By not requiring actual receipt, the Court misconstrues the intent of the legislature and violates Petitioners constitutional, 14th Amendment right to Due Process.

G. THE AMBIGUOUS EXPRESSION IN THE COMPLAINT OF RIE V. 6 ANGELS CANNOT BE A REAL JUDICIAL ADMISSION THAT RIE RECEIVED THE NOTICE IN JANUARY of 1999.

Petitioner's signature on the verification page of the complaint of other case of Rie vs. 6 Angels was alleged as a judicial admission. But the expression is logically ambiguous and Petitioner, who is a layman without such legal experiences and whose major was economics but not law and whose native language is not English, perceives it is not inconsistent with the fact that he received the Section 2966 Notice in April of 1999 with the cover letter.[23]

Petitioner, acting in pro per, stated in his complaint, "Although the Notice Pursuant to Civil Code 2966 was required at the time the note became due in 1993, it was not until January 7, 1999 that Defendant Tursugian served the required Notice ..." This statement was one part of a multi-faceted complaint, addressing several issues that Petitioner, as a layman, could not have understood. Petitioner saw the above statement not as an affidavit, but rather a part of a whole document, the complaint. Without words such as, "admission" or "admit" on the verification page of the complaint, the Petitioner could not have known that he was making an admission. However, even if viewed as a single statement, the Petitioner cannot see how the above quoted statement could be interpreted to mean that Petitioner was served the required Notice by the Tursugians on January 7, 1999.

As a layman, without legal training and whose native language is not English, the Petitioner had a very different perception of the above statement than that of the judiciary. Petitioner can comprehend how a legal perception of such a statement can differ. However, to punish Petitioner as a in pro per litigant and without

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[23] Rie v. Rosen, Appellate Brief p. 7. Whether Petitioner received the Notice (the same of Exhibit H) in January 7, 1999 or April 14, 1999 is a hot issue also in Rie vs. Galperin Case (BC290904), which is also petitioned to the United States Supreme Court.

providing the proper warning is to deny Petitioner of his 14th Amendment right to a fair trial and due process under the law.

H. THE APPLICATION OF THE ALLEGED JUDICIAL ADMISSION MADE IN A SEPARATE CASE SHOULD NOT APPLY TO THE RIE V. ROSEN CASE, AND SUCH AN APPLICATION VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS.

By applying the alleged judicial admission in the complaint of a separate case (Rie v. 6 Angels, BC223268), the Court denied the Petitioner's right to due process. The courts have recognized that while a judicial admission is considered to be conclusive on the party by whom it was made, a party to an action is ordinarily not foreclosed by such an admission made in another course of action.[24] Here, the court applied the alleged judicial admission in the Rie v. 6 Angles case to the Rie v. Rosen case. As a result, Petitioner was not able to raise critical issues for the Rie v. Rosen case. Further, there is debate as discussed above, as to whether the complaint was actually a judicial admission.

I. THE UNPLANNED AND RELUCTANT AND PERFUNCTORY HEARING FOR MOTION IN LIMINE ON AUGUST 6, 2003 CANNOT BE REGARDED AS AN ACCEPTABLE REAL HEARING AND VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS.

As described and analyzed in "VI. THE SCENARIO ON AUGUST 6, 2003 AND AUGUST 6 DISASTER", the hearing for motion in limine on August 6, 2003 was not a real hearing in due process, but an unplanned and perfunctory fake hearing without reading Petitioner's opposition including Rie's document. It is a serious issue and it is a disaster. It also infringes the civil right of Petitioner for due process and violates the 14th Amendment right to due process.

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[24] See e.g., Jones v. Piper Aircraft Corp., 18 F.R.D. 181, 183 (M.D. Pa. 1955).

Moreover, this serious disastrous infringement and violation has not been fixed or corrected by the California Appellate Court and its Supreme Court or any other agency of the State of California.

XI. CONCLUSION AND RELIEF SOUGHT

For the forgoing reasons, Petitioner respectfully requests this case be remanded to Trial Court to apply the proper standard of review of a reasonable lay-person under California Civil Procedure § 473, and excuse Petitioner's errors due to lack of legal training. And Petitioner requests that the Trial Court find that California Civil Code § 2966 require actual receipt of notice, and not apply the alleged judicial admission of the Rie v. 6 Angels case to Rie v. Rosen. Further, Petitioner requests that the Court remands this case to the Trial Court for the planned and real and fair hearing for motion in limine instead of the unplanned and reluctant and perfunctory hearing.

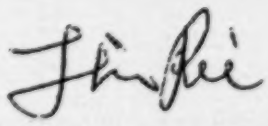
In addition, this case has high statistical value in the American legal history with so significant weird coincidences, which can be associated with "unconscionability" of the Defendants. As described in the opening brief at P 6-8, this case has so peculiar and so weird statistics and coincidences. Moreover, besides the existing 8 peculiarities, recently after February of 2005, additional coincidences and peculiarities in or related to this case were discovered or realized by Petitioner, a layperson. 9. On September 17, 1999 (foreclosure sales day), there were 2 more weird coincidences, one of which is that he was interpreting all day but the fee has not been paid yet even after he won the small claim, and thus now, he believes there was conspiracy between Rosen and the attorney requesting that service only once. 10. On October 7, 2003, there were total 4 hearings against him, and now he believes there was conspiracy between at least 2 attorneys to undermine BOA case (BC287880/B169668).[25] 11. The appellate

[25] Immediately after this discovery, he suspected conspiracy among 4 attorneys but later he realized that 1 attorney could be excluded from conspiracy since 3

judges aggravated all the 3 cases rather than compromising them. For example, they abused Exhibit H to find him to be a liar in Galperin case; and they prepared the case law of service described by the second issue in this case. These had been made neither by Judge Chalfant and nor by Judge Hiroshige. In other words, Appellate Judges made additional errors that were not made by those two judges respectively. These points caused him to believe the appellate judges were involved in a conspiracy.[26] Now, we have total 11 peculiarities.[27]

Petitioner does not know fully what are or can be federal issues. However, he prays the Court to consider this case very seriously not only for Petitioner but also for the people of the United States and for social justice and more conscionable society.

Respectfully submitted this 31st day of October 2005,



Jin Rie, Petitioner in Pro Per

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attorneys could attempt to undermine BOA case through abusing the already scheduled 1 hearing with that 1 attorney.

[26] Appellate judges also deprived Petitioner of the two causes of action, which had been still remained by Judge Alarcon in BOA case. But this aggravation only would have never made him to believe the conspiracy.

[27] Actually, we have one more peculiarity, which is mainly related to the above 11th peculiarity and the case laws. Petitioner is a lot concerned about the case laws as a guider of cultural renovation. Hence, regardless of his own personal interests, he pursues proper law system including proper case laws as one of the people of the United States. This is the 12th peculiarity with very low probability like 1%. The related book in Korean version was already published in 1997, and the English version (*Cultural Renovation, the Start*) has been delayed by this case and other derived cases for 6 years but it will be published soon. This English book has been published in August of 2005. If necessary, it will be submitted to the Court for a reference.

APPENDIX 1
STATUTORY PROVISIONS

California Code of Civil Procedure § 473: Amendment of pleadings

(a) (1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client,

and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney' s mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(c) (1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

(A) Impose a penalty of no greater than one thousand dollars ($ 1,000) upon an offending attorney or party.
(B) Direct that an offending attorney pay an amount no greater than one thousand dollars ($ 1,000) to the State Bar Client Security Fund.
(C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

IV Witkin Cal. Crim. Law Crim Trial § 256: Admonitions to Defendant
In order competently and intelligently to choose self-representation, "defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 582, supra, §248.)

In *People v. Lopez* (1977) 71 C.A.3d 568, 138 C.R. 36, the court *suggested* specific guidelines for trial judges to consider when a defendant asserts the right of self-representation:

(a) The defendant must be made aware of the dangers and disadvantages of self-representation. The admonition should include the following: (1) Self-

representation is almost always unwise and defendant may conduct a defense to his or her own detriment; (2) defendant will have to abide by the same rules as lawyers and will get no help from the judge; (3) the prosecution will be represented by experienced professional counsel who will have the advantage of skill, training, and ability; and (4) defendant will have no special library privileges nor a staff of investigators at defendant's beck and call. (71 C.A.3d 573.)

(b) The trial court should make some inquiry into defendant's intellectual capacity. The range of this inquiry might include the following: (1) The court might examine the defendant's education and familiarity with legal procedures. (2) If there is any question about defendant's mental capacity, the trial court should consider referral for a psychiatric exam. (3) To determine that defendant's choice is an intelligent one, defendant must be fully aware of his or her right to counsel at no cost. (4) The trial judge should consider exploring the nature of the proceedings, and the possible outcome and punishment. (5) Defendant should know that the right of self-representation may be terminated for misbehavior or trial disruption. (71 C.A.3d 573, 574.)

(c) The defendant waives any claim that self-representation was inadequate or that defendant was denied the effective assistance of counsel. Thus, defendant should know that he or she "will be throwing away one of the criminal defendant's favorite contentions on appeal." (71 C.A.3d 574.)

However, the test of a valid waiver of counsel "is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Bloom* (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698; see *People v. Cervantes* (1978) 87 C.A.3d 281, 287, 150 C.R. 819 [warning not adequate; record did not demonstrate knowing and intelligent election]; *People v. Fabricant* (1979) 91 C.A.3d 706, 713, 154 C.R. 340 [record did not reveal adequate warnings]; *People v. Torres* (1979) 96 C.A.3d 14, 22, 157 C.R. 560 [serious and complex offense required admonition of perils of self-representation; admonition could be memorialized at any place in the record]; *People v. Burdine* (1979) 99 C.A.3d 442, 447, 160 C.R. 375 [form petition to proceed in pro. per. sufficient to show knowing and intelligent election]; *People v. Barlow* (1980) 103 C.A.3d 351, 364, 163 C.R. 664 [criticizing *Fabricant; Faretta* does not require any particular warning]; *People v. Paradise* (1980) 108 C.A.3d 364, 366, 166 C.R. 484 [refusing to follow *Torres;* warning of risk of self-representation "need not appear of record so long as the record as a whole shows that the express waiver of counsel was intelligent and with understanding"]; *Benge v. Superior Court* (1980) 110 C.A.3d 121, 129, 167 C.R. 714 [record need not show advice to defendant,

only knowing and intelligent election]; *Zimmerman v. Municipal Court* (1980) 111 C.A.3d 174, 179, 168 C.R. 434 [*Lopez* does not require specific warning and record need not affirmatively show that defendant was advised of risks of self-representation]; *People v. Longwith* (1981) 125 C.A.3d 400, 407, 409, 178 C.R. 136 [*Lopez* criteria and standards not binding]; *People v. Spencer* (1984) 153 C.A.3d 931, 944, 945, 200 C.R. 693 [warning required when defendant personally presents case with attorney as cocounsel]; *People v. Mellor* (1984) 161 C.A.3d 32, 207 C.R. 383 [relevant question is whether trial judge made inquiry adequate to insure knowing and intelligent inquiry; *Lopez* criteria not binding]; *People v. Truman* (1992) 6 C.A.4th 1816, 1823, 9 C.R.2d 138 [claim that certain warnings were not given was insufficient to show that waiver was not knowing and intelligent]; *People v. Noriega* (1997) 59 C.A.4th 311, 315, 69 C.R.2d 127 [merely asking defendant if he knew of constitutional right to counsel and voluntarily waived it was inadequate].)

A warning that a self-represented defendant is precluded from asserting ineffective assistance of counsel as grounds for relief on appeal is not constitutionally required. (*People v. Bloom* (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698.)

Title 28 U.S.C. § 1915 (2005) Proceedings in forma pauperis
(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefore, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C.S. § 2255: Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or

otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of

the offense; or
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

California Rules of Court §1800: Definition
(a). [Definition]

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b). [Factors]

In deciding whether an action is a complex case under subdivision (a), the court shall consider, among other things, whether the action is likely to involve:

(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
(2) Management of a large number of witnesses or a substantial amount of documentary evidence;
(3) Management of a large number of separately represented parties;
(4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
(5) Substantial postjudgment judicial supervision.

(c). [Provisional designation]

Except as provided in subdivision (d), an action is provisionally a complex case if it involves one or more of the following types of claims:

(1) Antitrust or trade regulation claims;
(2) Construction defect claims involving many parties or structures;
(3) Securities claims or investment losses involving many parties;
(4) Environmental or toxic tort claims involving many parties;
(5) Claims involving mass torts;
(6) Claims involving class actions; or
(7) Insurance coverage claims arising out of any of the claims listed in subdivisions (c)(1) through (c)(6).

(d). [Court's discretion]

Notwithstanding subdivision (c), an action is not provisionally complex if the

court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to this subdivision.

California Government Code section 68607: Responsibilities and duties of judges

In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action.

The judges of the program shall, consistent with the policies of this article:

(a) Actively monitor, supervise and control the movement of all cases assigned to the program from the time of filing of the first document invoking court jurisdiction through final disposition.

(b) Seek to meet the standards for timely disposition adopted pursuant to Section 68603.

(c) Establish procedures for early identification of cases within the program which may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment.

(d) Establish procedures for early identification and timely and appropriate handling of cases within the program which may be amenable to settlement or other alternative disposition techniques.

(e) Adopt a trial setting policy which, to the maximum extent possible, schedules a trial date within the time standards adopted pursuant to Section 68603 and which schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing resetting caused by overscheduling.

(f) Commence trials on the date scheduled.

(g) Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation.

California Civil Code § 2966. Transaction including balloon payment note; Notice required; Failure to comply

(a) In a transaction regulated by this article, which includes a balloon payment note when the term for repayment is for a period in excess of one year, the holder of the note shall, not less than 90 nor more than 150 days before the balloon payment is due, deliver or mail by first-class mail, with a certificate of mailing obtained from the United States Postal Service, to the trustor, or his or her successor in interest, at the last known address of such person a written notice, to include:

(1) A statement of the name and address of the person to whom the balloon payment is required to be paid.
(2) The date on or before which the balloon payment was or is required to be paid.
(3) The amount of the balloon payment, or if its exact amount is unknown a good faith estimate of the amount thereof, including unpaid principal, interest, and any other charges (assuming payment in full of all scheduled installments coming due between the date of the notice and the date when the balloon payment is due).
(4) A description of the trustor's right, if any, to refinance the balloon payment, including a summary of the actual terms of the refinancing or an estimate or approximation thereof, to the extent known.

If the due date of the balloon payment of a note subject to this subdivision is extended prior to the time notice is otherwise required under this subdivision, this notice requirement shall apply only to the due date as extended (or as subsequently extended).

(b) Failure to provide notice as required by subdivision (a) does not extinguish any obligation of payment by the trustor, except that the due date for any balloon payment shall be the date specified in the note, or 90 days from the date the delivery or mailing of the notice, or the date specified in the notice, whichever date is later. If the operation of this section acts to extend the term of any such note, interest shall continue to accrue for the extended term at the contract rate and payments shall continue to be due at any periodic interval and on any scheduled payment schedule specified in the note and shall be credited to principal or interest under terms of the note. Default in any extended periodic payment shall be considered a default under terms of the note or security instrument.

(c) Any failure to comply with the provisions of this section shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice.

(d) Every note subject to the provisions of this section shall include the

following statement:

"This note is subject to Section 2966 of the Civil Code, which provides that the holder of this note shall give written notice to the trustor, or his successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due."

Failure to include this notice shall not invalidate the note.

(e) The provisions of this section shall apply to any note executed on or after July 1, 1983.

APPENDIX 2

DECISION OF THE CALIFORNIA SUPREME COURT
Jin Rie, Plaintiff and Appellant v. Alan Rosen, et al, Defendants and Respondents
Case No.: S131619

Court of Appeal, Second Appellate District, Division Four - No. B169669
S131619

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JIN RIE et al., Plaintiffs and Appellants,

v.

ALAN ROSEN, Defendant and Respondent.

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX 3

OPINION OF THE COURT OF APPEAL THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

Jin Rie, Plaintiff and Appellant v. Alan Rosen, et al, Defendants and Respondents

Case No.: B169669

JIN RIE et al., Plaintiffs and Appellants, v. ALAN L. ROSEN et al., Defendants and Respondents.

B169669

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2005 Cal. App. Unpub. LEXIS 219

January 10, 2005, File

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC275364. Ernest Hiroshige, Judge.

DISPOSITION: Affirmed.

CORE TERMS: notice, cause of action, demurrer, foreclosure, balloon, misrepresentation, notice of default, intentional misrepresentation, breach of contract, statute of limitations, conspiracy, causes of action, trust deed, monthly payments, verified, partial, negligent misrepresentation, breach of fiduciary duty, foreclosure sale, collection, lawsuit, holder, repay, notice of sale, foreclosure proceedings, tendered, trustor, statute of limitations defense, deed of trust, intentionally

COUNSEL: Jin Rie, in pro. per., and for Plaintiffs and Appellants.

Rosen and Loeb and Alan L. Rosen for Defendants and Respondents.

JUDGES: CURRY, J.; EPSTEIN, P. J., HASTINGS, J. Concurred.

OPINIONBY: CURRY

OPINION:

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, appellants Jin and Cheon Rie, n1 husband and wife, purchased property from Asadur and Petra Tursugian who held back a second deed of trust. In 1999, the Tursugians foreclosed on the deed of trust. The Ries filed a lawsuit against the Tursugians, their attorney Alan Rosen, his law firm--the Law Offices of Rosen and Loeb, n2 and the company that had handled the foreclosure, SBS Trust Deed Network (SBS).

n1 References to "Rie" herein are to Jin Rie. Appellants will jointly be referred to as "the Ries."

n2 Rosen and his firm are jointly referred to herein as Rosen.

First Amended Complaint

The original complaint is not in our record, although the parties and the court indicated it was filed on June 7, 2002. The first amended complaint (FAC) alleged that the Tursugians held a second deed of trust on the Ries' property in the original amount of approximately $ 42,000. In 1997, the parties "entered into a written agreement . . . whereby [the Ries] were to repay [the loan] in monthly payments of $ 4,000." The Ries performed that agreement until the latter part of 1998, at which time the parties allegedly reached a new arrangement.

The FAC further alleged that "during the period from 1997 through December 1998 and June 1999, Tursugians on several occasion agreed to accept partial payments from [the Ries] on the balance of the note." But when partial payments were tendered, the Tursugians rejected them. Instead, the Tursugians, through their lawyer Rosen, "claimed to have given notice in January

1999 of the balloon payment" which the Ries denied receiving, and "attempted to back-date notices of balloon payments in order to demonstrate compliance with the 90-day advance notice requirement of [*Civil Code section 2966*]." n3 The FAC said the Ries did not receive the section 2966 notice until April 1999.

> n3 As will be discussed, section 2966 requires holders of notes with balloon payments to provide written notice by certified mail of when the payment is due. The notice at issue in this case will be referred to herein as "the section 2966 notice."

A notice of default was served in May 1999. The FAC claimed that the notice of default was defective because it contained "amounts due, interest due, and other items for which there [was] no explanation nor reasonable calculations." The FAC also alleged that no notice of foreclosure sale was ever received by the Ries, and they did not learn about the September 17, 1999, sale of the property until sometime after it occurred.

According to the FAC, the property was purchased by 6 Angels, Inc. In December 1999, the holder of the first trust deed foreclosed, and the Ries reacquired the property by paying off 6 Angels and the first trust deed lender.

The FAC contained eight causes of action. The first cause of action was for wrongful foreclosure and was brought against all defendants, including nonrespondent SBS. It alleged that defendants failed to carry out foreclosure proceedings properly in that they "failed to rely on proper notices of balloon payments as required by *Civil Code § 2966*, failed to allow the requisite time required under the code for payment of such balloon payment demand, failed to serve a notice of default after the expiration of such time, failed to file a notice of default that accurately and correctly stated the terms of the loan and the deficiency, failed to account for the agreements reached between the Tursugians and [the Ries] in resolving the modest amount of payments remaining on the Second Trust Deed, and failed to properly notice and serve a Notice of Sale as required by the Code."

The second cause of action for breach of contract was alleged against respondents Rosen and the Tursugians only. The FAC alleged that the parties entered into a written agreement with the Tursugians whereby the Ries were to repay the loan in monthly payments of $ 4,000. The Ries "honored and performed said agreement at all times until the latter part of 1998, whereupon the parties reached a new arrangement concerning the payments of the unpaid principal [of $ 13,000]." Attached as an exhibit to the FAC was a letter to Rie dated December 10, 1998, which stated: "I am in receipt of your letter and check . . . in the amount of $ 292.00. Enclosed please find above said check. You have failed twice to repay this debt as scheduled and agreed upon. Your claim in regards to the roof is ludicrous. I will not forgive $ 2,000 of the debt owed to me as I am sure that the statute of limitations has passed long ago. I demand payment in full or continuance of your monthly payment of $ 4000.00. These are the only two options I will agree to. If you do not comply I will have no choice but to begin forclosure [*sic*] proceedings. I will await your prompt response. I will allow you 15 days to respond." The letter was unsigned, and was said to represent "the written portion" of the parties' agreement.

In the third cause of action for misrepresentation, the Ries alleged that respondents made "numerous representations" concerning "the terms under which [they] would accept payments on the balance of the Note . . ., the time frames under which they would accept such payments, the circumstances under which [the Ries] would lose or forego their rights, . . . falsified the dates that certain critical events took place in order to deprive [the Ries] of certain statutory rights[, and] . . . failed to properly provide notice to [the Ries] and intentionally and harmfully withheld such information from [the Ries]."

The fourth cause of action for unfair debt collection practices alleged that respondents violated the "Fair Debt Collection Act" n4 by making misrepresentations and false promises, and by keeping critical information from the Ries. It further alleged that respondents "used false information, fabricated notices that were

never sent, [and] entered into agreements with [the Ries] and thereafter rejected payments made pursuant to such agreements."

n4 This may be an attempted reference to the Robbins-Rosenthal Fair Debt Collection Practices Act, *Civil Code section 1788* et. seq. That provision, however, applied only to those who, "in the ordinary course of business, regularly on behalf of himself or herself or others, engages in debt collection" and does not apply to "an attorney or counselor at law." (*Civ. Code, § 1788.2*, subd. (c).)

The fifth cause of action for fraud alleged that respondents deceived the Ries about reaching an arrangement on the note "in order to fraudulently force the property into foreclosure."

The sixth cause of action alleged that all defendants, including SBS, entered into a conspiracy in order to deprive the Ries of their valuable property in order to collect a debt of $ 13,000.

The seventh cause of action for interference with economic relations alleged that respondents interfered with the Ries' relationship with the Bank of America in order "to convince Bank of America to abandon [the Ries'] line of credit" by "contacting the [Ries] and sending letters claiming that [the Ries] should repay [their] existing line of credit in full to Bank of America."

In the eighth cause of action for breach of fiduciary duty against all defendants, the Ries alleged that defendants breached duties owed under the deed of trust.

Demurrer to First Amended Complaint

Respondents demurred, requesting that the court take judicial notice of a verified complaint in a prior action initiated by Rie, n5 which contained the following statement: "It was not until January 7, 1999 that defendant Tursugian served the required Notice." n6

n5 The Ries, while represented by Attorney Ron Galperin, had filed an earlier action, Rie v. 6 Angels, Inc. (Super. Ct. L.A. County, No. BC223268), in which 6 Angels, the purchaser of the real property at the foreclosure sale, and the Tursugians were named defendants. The

complaint in that action contained similar allegations of fraud and breach of contract.

n6 The memorandum in support of respondents' demurrer is not in our record. The above was quoted in the court's order.

The court sustained without leave to amend with respect to the causes of action for wrongful foreclosure, breach of contract, and conspiracy. Concerning the wrongful foreclosure claim, the court accepted as true that the section 2966 notice was served on January 7, 1999, as stated in the Rie v. 6 Angels action, noting that nowhere in the verified complaint in that action was there an allegation that the notice was not received by the Ries. In addition, the court stated that the Ries' allegations that they did not receive the notice were "irrelevant" because: "[The Ries] were nevertheless required to make the balloon payment by 4/15/99. *Civil Code § 2966(b)* provides any failure to provide notice of a due balloon payment as required by that section does not extinguish a trustor's obligation to make payments on a note, 'except that the due date for any balloon payment shall be the date specified in the note, or 90 days from the date the delivery or mailing of the notice, or the date specified in the notice, whichever date is later.' [The Tursugians] served notice of the due balloon payment on 1/7/99. [The Ries] were thus required to make the balloon payment on 4/15/99, since it was a later date than the date 90 days after the notice was mailed. Having failed to make that payment, [the Ries'] claim of wrongful foreclosure is without merit."

The court concluded that the breach of contract claim was "defective" because the written document attached to the complaint was contradictory to other allegations that indicated that some compromise other than continued payment of $ 4,000 per month or immediate payment of the balance had been reached. In addition, the author of the document was not identified in the FAC, and it was not signed.

As to the third cause of action for misrepresentation, the court rejected a statute of limitations defense, stating: "[The Ries]

allege that they did not learn of the foreclosure sale until after 9/17/99 and did not receive the notice of balloon payment or notice of default. Accordingly there is nothing to indicate that they should have known before 9/17/99 of their being harmed by [respondents'] alleged intentional misrepresentations." The court further ruled that "the allegations are sufficient to apprise [respondents] of the claims being made against them." The court tentatively granted the demurrer without leave to amend as to the fifth cause of action for fraud on the ground that it was duplicative of the third cause of action for misrepresentation. In its final order, however, the Ries were given permission to amend the third and fifth causes of action to clarify that the former was for intentional misrepresentation and the latter for negligent misrepresentation.

The court stated concerning the fourth (unfair collection practices) cause of action that "the allegations that [the Ries] never received notice of balloon payment and the allegations of an agreement made on or about December 1998 or January 1999 are contradicted or unsupported and therefore cannot form the basis of a claim for unfair debt collection practices." The contention that respondents "used false information" was "vague." The demurrer was sustained with leave to amend.

Demurrer was sustained to the sixth cause of action for conspiracy with leave to amend because it was based on the theory of wrongful foreclosure to which demurrer had been sustained. No reference was made in the court's order to the seventh cause of action for intentional interference.

The court's order categorized the demurrer to the eighth cause of action for breach of fiduciary duty as "overruled." However, the order clarified: "The Tursugians were the beneficiaries under the trust deed. Rosen and Rosen and Loeb were their attorneys and neither trustees nor beneficiaries under the trust deed. [The Ries] fail to indicate how [respondents] owed them a fiduciary duty. However, SBS Trust Deed Network is alleged to have failed to insure proper compliance with the state foreclosure laws."

Second Amended Complaint

The Ries filed a second amended complaint (SAC) in compliance with the trial court's ruling. In the first cause of action for negligent misrepresentation, the SAC alleged that respondents made misrepresentations concerning the terms under which they would accept payment on the note, the time frames under which they would accept payments, and the circumstances under which the Ries would lose or forego their rights. In addition, respondents "falsified the dates that certain critical events took place" and "failed to notify [the Ries] of certain foreclosure proceedings."

In the second cause of action for intentional misrepresentation, the SAC alleged that respondents "fraudulently and intentionally deceived [the Ries] into believing that the parties had reached an arrangement with respect to handling the remaining balance" on the note and "informed [the Ries] that [respondents] would accept certain terms of payment on the promissory note," and then "refused to accept payments in order to fraudulently force the property into foreclosure." The SAC also accused respondents of "fabricating documents and backdating them to reflect earlier dates of notices that were never sent on the date proffered."

The third cause of action for interference with prospective economic advantage and the fourth cause of action for breach of fiduciary duty in the SAC were essentially the same as in the FAC, except for being renumbered, and again named all defendants.

Demurrer to Second Amended Complaint

Respondents demurred to the entire SAC. With respect to the intentional misrepresentation claim, they alleged that "when the [respondents] served the Balloon Notice on January 7, 1999, the [Ries] knew, or reasonably should have known, that their cause of action based on fraud had accrued. Since this case was filed on June 7, 2002, any cause of action based on intentional misrepresentation would have expired in January, 2002." With

respect to negligent misrepresentation, they raised the statute of limitations defense, and also argued that since the court had found the section 2966 notice had been sent on January 7, 1999, "the foreclosure was judicially determined to be entirely proper," and the Ries could not contend that they suffered any damages as a result of the alleged misrepresentations.

This time the court sustained the demurrer without leave to amend as to the first, second, and fourth causes of action for misrepresentation and breach of fiduciary duty. It sustained the demurrer with leave to amend as to the third cause of action for interference with economic relations. The court stated that it sustained the demurrer with respect to the negligent misrepresentation claim because the allegations were vague, the representations alleged appeared to be intentionally rather than negligently made, and the damages alleged were caused by the foreclosure, "a transaction which the court previously found to be proper."

With respect to intentional misrepresentation, the court stated: "In ruling on Defendants' prior demurer, the court took judicial notice of [the Ries'] verified complaint that was filed in [Rie v. 6 Angels,] case BC223268, and the allegations in P20 of that complaint that [the] Tursugians had served notice of the balloon payment on 1/7/99. The court found that this allegation amounted to an admission by [the Ries] that they had received the requisite notice as of 1/7/99." This meant that "[the Ries] knew, or reasonably should have known, as of that date that the defendants' representations regarding the alleged payment arrangement were false and that the defendants did not intend to honor it." Because they filed their complaint on June 7, 2002, the claim was barred by the three-year statute of limitations for intentional fraud. The Ries pointed out that their complaints alleged that respondents made representations concerning partial payments until at least June 1999. The court responded: "This amendment is an impermissible attempt to toll the statute of limitations . . . . [The Ries] cannot carte blanche amend to get around the statute of limitations without some showing of justification for the material

change in factual assertions. [The Ries] are bound by the contradictory verified complaint in case BC223368 in which notice of the balloon payment on 1/7/99 is binding upon them for the purposes of the statute of limitations analysis as to this cause of action."

The intentional interference cause of action was "unintelligible," according to the court, because it "alleged merely conclusions (e.g., 'defendants . . . intentionally and deliberately interfered with such economic relations by improperly seeking to defame [the Reis] and subvert Bank of America's policies') and statements whose significance is unclear (e.g., 'defendants . . . contacted the [Ries] and sent letters claiming that [the Ries] should repay its existing line of credit in full to Bank of America')." Demurrer was sustained with leave to amend.

Demurrer was sustained in part to the breach of fiduciary cause of action, eliminating respondents only, leaving SBS as a defendant.

Third Amended Complaint

The Ries filed the third amended complaint (TAC) without the assistance of counsel. In it, they restated their claims for wrongful foreclosure, negligent misrepresentation, intentional misrepresentation, unfair collection practices, and conspiracy. In the cause of action for intentional interference, new allegations were added concerning respondents' motives, but no new allegations concerning what had been done to interfere. The breach of fiduciary duty cause of action was restated essentially as in the prior pleadings.

Respondents moved in limine for an order excluding all evidence at trial relating to the first, second, third, fifth, and seventh causes of action in the TAC, due to the sustaining of the demurrers without leave as to those causes of action. The motion was granted. The Ries refused to try the case without these claims, and the matter was dismissed. The Ries appealed.

DISCUSSION

I

The Ries' brief begins with a list of facts that they contend require special consideration, e.g., the fact that only around $ 13,000 was due to the Tursugians when the foreclosure occurred, a relatively minor amount when compared to the property's worth of $ 350,000; the fact that the Tursugians were the holders of the second trust deed rather than the first trust deed; the fact that the first trust deed had a balance that constituted two-thirds of the value of the property; the fact that the Tursugians rejected a $ 4,000 partial payment at least three times; and the fact that foreclosure was consummated to obtain the balance due plus foreclosure expenses. Other than the fact respondents repeatedly rejected the Ries' proffered payments--which, as we will discuss, tends to undermine their claims--these facts have no legal significance. Holders of trust deeds are entitled to utilize nonjudicial foreclosure proceedings to recover their debt even when the amount owed is relatively minor in comparison to the value of the property, and are entitled to their foreclosure expenses. (See *Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1174.)*

Nor is there any significance to the fact that, in the Rie v. 6 Angels lawsuit, n7 the Tursugians' demurrer was overruled. The two lawsuits were similar, but not identical. We note, for example, that the prior complaint was based on the factual allegation that the balloon payment was due in 1993, and that the Tursugians accepted partial payments for six years prior to sending the notice that a balloon payment was due. The present action is based on the balloon payment being due in 1999 and partial payments being repeatedly rejected. In addition, that lawsuit was filed in January 2000, immediately following the events on which it was based, so the statute of limitations was not an issue.

n7 For reasons that are not clear, that lawsuit was dismissed--presumably without prejudice or it would have been raised in the current action as res judicata.

The Ries' brief also discusses the hearing on the motion in limine at length. Rie attempted to reargue the viability of causes of action to which demurrers had previously been sustained without leave to amend. He complains that the trial court did not give him a fair hearing. The only issue at that hearing was whether the Ries were prepared to go to trial in the absence of the claims to which demurrers had been sustained. They obviously were not willing to try the case under those conditions, and the entry of dismissal was appropriate.

II

A. Wrongful Foreclosure

In their brief, the Ries quote the sentence from the verified complaint in Rie v. 6 Angels on which the trial court relied in sustaining demurrers to both the wrongful foreclosure and misrepresentation claims: "Although the Notice pursuant to *Civil Code 2966* was required at the time the note became due in 1993, it was not until January 7, 1999 that Defendant Tursugian served the required Notice." The Ries argue this was an "ambiguous expression," and could reasonably be interpreted to mean that the section 2966 notice was served on or after January 7, 1999--or as late as April 1999 when they alleged they finally received the notice. We do not agree that the words can be stretched that far. There is nothing ambiguous about the statement. The clear meaning is that the section 2966 notice was served on January 7, 1999.

The Ries are on firmer ground when they contend that the trial court expanded the meaning of the statement in the verified complaint by interpreting it to mean not just that the Tursugians served the section 2966 notice on January 7, 1999, but that the Ries *received* the notice at around that time. We agree. The quoted statement said that the requisite notice was "served" which under the statute can be accomplished by mailing; nothing was said about receipt. The doctrine of judicial admissions does not

allow the court to liberally construe a party's former pleading, and read something into it that is not there.

Although we agree that the court interpreted the statement overbroadly, we do not believe that its misinterpretation had any appreciable impact on its ruling on the wrongful foreclosure claim. As the trial court pointed out in its order, section 2966 requires the holder of a note containing a balloon payment to "not less than 90 nor more than 150 days before the balloon payment is due, deliver *or mail* by first-class mail, with certificate of mailing obtained from the United States Postal Service, to the trustor, or his or her successors in interest, at the last known address of such person a written notice" that includes "the date on or before which the balloon payment was or is required to be paid." (§ 2966, subd. (a)(1), italics added.) Although we have found no cases interpreting this provision, the court in *Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 111 Cal. Rptr. 112* was faced with a similar issue. There, the defaulting buyers had moved without filing a change of address. The trustee mailed a copy of the notice and default and election to sell to the buyers at their former address. It was not delivered. The court ultimately held that because the trustee later learned the correct address, it should have forwarded the notice and was equitably estopped from relying on the notice. But the court also stated: "Deeds of trust are creatures of statute; unless the statutes conflict with constitutional guarantees of due process, statutory procedures delineate the steps which establish jurisdiction and authority for a trustee's sale. [Citations.] A cursory review of *Civil Code section 2924* evidences a periodic and genuine concern by the Legislature to improve the opportunity for a trustor in default to receive actual notice of default and notice of sale. *We pointedly emphasize, however, that Civil Code sections 2924-2924h, inclusive, do not require actual receipt by a trustor of notice of default or notice of sale.*" (*Id. at p. 746,* italics added; accord, *Knapp v. Doherty (2004) 123 Cal.App.4th 76, 83-89.)*

The point made in *Lupertino* is that a debtor should not be able to thwart a nonjudicial foreclosure by the mere expedient of

moving and leaving no forwarding address. Similarly, a debtor should not be permitted to delay foreclosure indefinitely by refusing to accept certified mail. The Ries' own allegations make clear that they knew the balloon payment was due. Negotiations with the Tursugians were underway. The admission that the section 2966 notice was mailed in January 1999, together with the admissions that the Ries knew the balloon payment was due and that the notice was actually received in April 1999--long before the foreclosure sale took place--leads us to agree with the trial court that the Ries' denial that they received the notice in January was irrelevant. n8

> n8 The FAC contained allegations that the notice of default, although properly served, contained questionable figures and that no notice of sale was posted. Since neither of these factors are mentioned in the brief on appeal, and no legal authorities are cited concerning who must receive such notice or how it must be given, we assume that the Ries no longer urge these alleged defects as a basis for the wrongful foreclosure claim.
>
> In addition, neither party discusses the statute of limitations on an action for wrongful foreclosure or failure to give the section 2966 notice. We note that *section 2967 of the Civil Code* provides: "Any action arising under this article may be brought within two years from the date on which the liability arises, except that where a material disclosure under this article has been materially and willfully misrepresented, the action may be brought within two years of discovery of the misrepresentation." (See also *Engstrom v. Kallins (1996) 49 Cal.App.4th 773,783* [applying the three-year statute of limitations contained in *Code of Civil Procedure 338*, subdivision (a) where the claim was based on failure to give notice to a cosigner, but holding that the statute accrues on the date foreclosure proceedings are instituted or begin rather than when the sale takes place].)

B. Misrepresentation

Actual receipt of the January 1999 section 2966 notice was also the basis for the court's decision to sustain the demurrer to the intentional misrepresentation cause of action. Before discussing the substance of that claim, we acknowledge a discrepancy in the trial court's orders pointed out in the Ries' brief. In the order ruling on the demurrer to the FAC, the court

rejected a statute of limitations defense, stating "[The Ries] allege that they did not learn of the foreclosure sale until after 9/17/99 and did not receive the notice of balloon payment or notice of default.[n9] Accordingly, there is nothing to indicate that they should have known before 9/17/99 of their being harmed by [respondents'] alleged intentional misrepresentations. [The Ries]' claim for intentional misrepresentation is timely." On that basis, the demurrer to the intentional misrepresentation claim in the FAC was overruled. Yet in the order ruling on the demurrer to the SAC, the court concluded there was a limitations bar and sustained the demurrer to that claim without leave to amend because "[the Ries] knew, or reasonably should have known, as of [the date of the section 2966 notice] that the [respondents'] representations regarding the alleged payment arrangement were false and that the defendants did not intend to honor it."

> n9 This is incorrect. In fact, the FAC stated that the notice of default was received in May 1999, but that some of the calculations were difficult to decipher.

As we stated above, we disagree with that aspect of the court's interpretation. The prior pleading did not state that the section 2966 notice was received in January 1999. Moreover, the court erred in essentially reconsidering its prior ruling on the statute of limitations defense without a proper motion for reconsideration having been filed. Having said that, our task is to review the pleadings and determine the validity of the court's actions in sustaining the demurrer, rather than its reasoning, and to affirm whichever of the two discordant orders is legally correct.

The elements of fraud are well known: "(1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation)." (*5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 668*, p. 123.) In addition, "fraud actions have been classed as 'disfavored,' and are subject to strict requirements of particularity in pleading. The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the

fullest possible details of the charge in order to prepare his defense. Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Id.*, § 669, p. 125.) ""This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.'"" (*Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184,* quoting *Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.)* The Supreme Court in *Small* also made clear that a complaint for negligent misrepresentation should be pled with the same specificity required in an action for fraud. (*Ibid.*)

The effect of this rule of specificity is twofold: "(1) General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged; (2) every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings [citation] will not ordinarily be invoked to sustain a pleading defective in any material respect." (5 Witkin, *supra*, Pleading, § 669, p. 125.)

Nowhere in their pleadings have the Ries specifically stated what representations were made, when, or by whom. The SAC, for example, stated: "between December 1998 and September 1999, [respondents] and each of them made numerous representations to [the Ries] . . . concerning the terms under which [respondents] would accept payment on the balance of the Note . . ., the time frames under which they would accept such payments, [and] the circumstances under which [the Ries] would lose or forego their rights." The SAC further alleged in an attempt to be "specific" that "[respondents] informed [the Ries] that they would accept certain monthly payments, and after [the Ries] paid such sums, [respondents] declined to accept them." All the allegations were vague both as to when statements were made and who made them. The only allegation specific as to content--that one or all of the respondents said that he, she, or they would "accept certain monthly payments"--undercuts any theory of

reliance when it goes on to state that such payments were never accepted.

With respect to reliance, causation, and damages, the SAC alleged: "if [the Ries] were aware of the falsity of the representations and actions of [respondents], [the Ries] would not only have taken appropriate precautionary measures, which they did not take, but would have also not obtained funds in an emergency basis, and not allowed their property to fall into foreclosure, damaging their credit, losing income, and harming them financially." The SAC further alleged that damages included "loss of their property, loss of use of their property, loss of earnings, as well as severe emotional distress."

The injuries described are the natural result of the foreclosure, as the trial court stated. The cause of the foreclosure was the Ries' failure to pay the note when it was due. That cannot be blamed on the alleged misrepresentations unless the representations lulled the Ries into inaction. (See *Wanger v. EMC Mortgage Corp. (2002) 103 Cal.App.4th 1125, 1138* ["The issue of whether or not the foreclosure is included in the actual damages suffered by [plaintiff] will depend upon her showing that the foreclosure occurred 'as a result of the failure' [citation] to deliver the notice of transfer"].) The allegations attempt to make this connection, yet, other allegations in the SAC undercut the existence of any causal connection. The Ries admitted that they received a December 1998 letter warning them that in the absence of payment in full or continuance of $ 4,000 monthly payments, foreclosure proceedings would begin; that every proffered payment was returned; that they were contacted by the Tursugians' counsel in April 1999, who forwarded them a copy of the section 2966 notice dated January 7, 1999; and that they received a notice of default in May 1999. n10 Certainly by May 1999, any reasonable person would have realized that the Tursugians fully intended to go forward with the foreclosure. Unless there was a specific misrepresentation made after that time--and no such allegation appears in the SAC--the trial court was correct to sustain the demurrer on statute of limitations

grounds and should also have sustained it on grounds of lack of specificity.

> n10 The Ries disputed the amount stated in the notice of default, but there is no contention that they tendered that amount or any lesser amount that they believed to be due to the Tursugians. The only specific reference to a tender of any type states that "In or about January 1999, [the Ries] tendered payment of approximately $4,756 which Tursugians improperly rejected."

The same is true of the allegations regarding alleged falsification of the date of the notice and failure to provide notice. The Ries knew by April 1999 that the Tursugians were alleging that the section 2966 notice was served in January 1999. The complaint was filed more than three years later. This was beyond the three- year statute of limitations applicable to fraud.

C. Breach of Contract

The trial court sustained the demurrer to the breach of contract claim because the handwritten letter attached to the complaint that was purported to be the "written portion" of the parties' agreement was contradicted by other allegations that indicated that some compromise other than continued payment of $ 4,000 per month or immediate payment of the balance was reached. In addition, the author of the document was not identified in the FAC, and it was not signed.

We agree with the trial court. Proper statement of a breach of contract claim requires allegations of: "(a) the contract [citation]; (b) plaintiff's performance or excuse for nonperformance [citation]; (c) defendant's breach [citation]; and (d) damage to plaintiff [citation]." (*4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476*, p. 570.) "A written contract is usually pleaded by alleging its making and then setting it out verbatim . . . in the body of the complaint or as a copy attached and incorporated by reference." (*Id.*, § 479, p. 572.) Alternatively, it can be pled according to its legal effect. (*Id.*, § 480, p. 573.) "This is more difficult, for it requires careful analysis of the instrument,

comprehensiveness in statement, and avoidance of legal conclusions, and it involves the danger of variance where the instrument proved differs from that alleged[.]" (*Ibid.*) An "oral contract is pleaded according to its legal effect." (*Id.*, § 483, p. 575.) "In order to avoid a special demurrer, it is necessary to specify that the contract is written, oral, or implied by conduct." (*Id.*, p. 574.) In addition, "the allegation of performance is an essential part of [the plaintiff's] cause of action." (*Id.*, § 491, p. 582.)

The FAC alleged that after the Ries stopped performing the parties' 1997 agreement, "in or about December 1998 and January 1999, [respondents] agreed in writing and confirmed orally to allow [the Ries] additional time to make the monthly payments, and forego any balloon payments" and that the "written portion of said agreement" was attached. But the December 1998 document can only be seen as an offer rather than a contract. It clearly stated that no portion of the debt would be forgiven, that the only two acceptable options were payment of the balance or continuance of monthly payments of $ 4,000, and that the author would "await [the Ries'] prompt response." Nowhere did the FAC state that the Ries responded by unconditionally accepting that offer or that they performed according to its terms. In fact, a letter from Rie to the Tursugians attached to the TAC indicated that the Ries were attempting to negotiate different terms as late as September 1999. n11 Since the allegations were confused and contradictory, and no offer was made to clarify, the court was correct to sustain the demurrer to the breach of contract claim in the FAC.

n11 This included a deduction of $ 2,000 for roof repair or payment of the balance by December 1999. The Ries did not include a breach of contract claim in the TAC.

D. Conspiracy

The conspiracy cause of action in the FAC was based on all defendants, including SBS, engaging in a conspiracy to "deprive [the Ries] of their property." "It is the long established rule that a conspiracy, in and of itself, however atrocious, does not give rise

to a cause of action unless a civil wrong has been committed resulting in damage." (*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652,* disapproved in part on another ground in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503.)* In the absence of any viable tort claim, the conspiracy claim could not stand, as the trial court ruled.

DISPOSITION

The judgment is affirmed.

CURRY, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.